

FILED

FEB 20 2008

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

82600-5

26541-2-III

COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, APPELLANT

v.

MARK J. AFANA, RESPONDENT

APPEAL FROM THE SUPERIOR COURT

OF SPOKANE COUNTY

HONORABLE ELLEN KALAMA CLARK

BRIEF OF APPELLANT

STEVEN J. TUCKER
Prosecuting Attorney

Andrew J. Metts
Deputy Prosecuting Attorney
Attorneys for Appellant

County-City Public Safety Building
West 1100 Mallon
Spokane, Washington 99260
(509) 477-3662

INDEX

APPELLANT'S ASSIGNMENTS OF ERROR.....1
ISSUES PRESENTED.....2
STATEMENT OF THE CASE.....2
ARGUMENT.....4
CONCLUSION.....10

TABLE OF AUTHORITIES

WASHINGTON CASES

STATE V. ACREY, 148 Wn.2d 738,
64 P.3d 594 (2003)..... 4

STATE V. ARANGUREN, 42 Wn. App. 452,
711 P.2d 1096 (1985)..... 6

STATE V. ARMENTA, 134 Wn.2d 1,
948 P.2d 1280 (1997)..... 6

STATE V. BROWN, 154 Wn.2d 787,
117 P.3d 336 (2005)..... 7, 8

STATE V. MOTE, 129 Wn. App. 276,
120 P.3d 596 (2005)..... 9

STATE V. O'NEILL, 148 Wn.2d 564,
62 P.3d 489 (2003)..... 5, 6

STATE V. RANKIN, 151 Wn.2d 689,
92 P.3d 202 (2004)..... 9

STATE V. THORN, 129 Wn.2d 347,
917 P.2d 108 (1996), *overruled in part by*
State v. O'Neill, 148 Wn.2d 564,
62 P.3d 489 (2003)..... 6

STATE V. YOUNG, 135 Wn. 2d 498,
957 P.2d 681 (1998)..... 5, 7

CONSTITUTIONAL PROVISIONS

ARTICLE 1 § 7..... 4

I.

APPELLANT'S ASSIGNMENTS OF ERROR

- A. THE TRIAL COURT ERRED IN SUPPRESSING THE STATE'S EVIDENCE BASED ON A POLICE INSTITUTED SOCIAL CONTACT WITH THE PASSENGER.
- B. THE TRIAL COURT ERRED IN MAKING THE LEGAL CONCLUSION THAT THE CONTACT BETWEEN THE DEPUTY AND THE DEFENDANT WAS NOT A SOCIAL CONTACT. Conclusion of Law #2 CP 25.
- C. THE TRIAL COURT ERRED IN MAKING THE LEGAL CONCLUSION THAT "MS. BERGERON" WAS A PASSENGER IN THE VEHICLE AND NOT A PEDESTRIAN. Conclusion of Law # 3 CP 25.
- D. THE TRIAL COURT ERRED IN MAKING THE CONCLUSION OF LAW THAT *STATE V. BROWN* APPLIES TO THIS CASE AND *STATE V. MOTE* DOES NOT APPLY. Conclusion of Law # 4 CP 26.
- E. THE TRIAL COURT ERRED IN MAKING THE LEGAL CONCLUSION THAT *STATE V. MOTE* IS A DIVISION

ONE CASE AND NOT BINDING ON THE COURT.

Conclusion of Law #5 CP 26.

- F. THE TRIAL COURT ERRED IN MAKING THE LEGAL CONCLUSION THAT THE ARREST OF THE PASSENGER RESULTED FROM AN UNLAWFUL DETENTION OF THE PASSENGER AND THE EVIDENCE DISCOVERED WAS SUPPRESSED.

Conclusion of Law #6 CP 26.

II.

ISSUES PRESENTED

- A. DOES AN OFFICER IMPROPERLY SEIZE THE OCCUPANTS OF A PARKED AUTOMOBILE BY ASKING THE OCCUPANT'S NAMES?

III.

STATEMENT OF THE CASE

The facts are, in the main, undisputed. On the date in question, June 13, 2007, at 3:39 AM, Spokane County Sheriff's Deputy Miller noticed a legally parked vehicle in a relatively rural area of Spokane County. CP 24, 18. The deputy shined his spotlight into the car and saw

two people inside. CP 18. The deputy contacted the occupants and inquired what they were doing. CP 18. The occupants stated that they were watching a movie. CP 18. The deputy also asked if they had any identification. CP 18. The defendant produced a driver's license and the passenger gave her name verbally.

The deputy wrote down the information and returned the defendant's license to him. CP 18. The deputy suggested to the couple that they might pick a better location to watch the movie. CP 18.

The deputy returned to his patrol car and checked the passenger's name, which came back as having an outstanding warrant. CP 18. The defendant had begun to pull away, so the deputy activated his emergency lights and stopped the car to effect an arrest of the female occupant. CP 18.

During a search of the auto incident to the arrest of the female, a black cloth bag was discovered with a baggie of methamphetamine and a separate baggie containing marijuana. Since the deputy had earlier seen this bag on the defendant's lap, the defendant was arrested for possession of controlled substances.

The defendant was charged with possession of a controlled substance – marijuana and possession of a controlled substance – methamphetamine. CP 1.

Prior to trial, the defendant brought a CrR 3.6 motion seeking to suppress the discovery of drugs in his car as a result of a search incident to the arrest of the female occupant of the car. CP 14-16. The trial court granted the defendant's motion and suppressed the State's evidence. CP 26. The State filed this appeal. CP 27-31.

IV.

ARGUMENT

The trial court suppressed the evidence based on the fact that the deputy asked the passenger what her name was. The trial court bases its ruling on irrelevant cases and incorrect interpretations of the law of the State of Washington. The facts of this case differ between the parties on only minor points. The real question in this case is whether an officer can approach a legally parked car, ask the occupants what is going on and ask the occupants their names without instituting a "seizure."

A trial court's conclusions of law will be reviewed *de novo*. *State v. Acrey*, 148 Wn.2d 738, 745, 64 P.3d 594 (2003). The defendant couched his trial court arguments in terms of a violation of Art. 1 § 7 of the Washington State Constitution. CP 17.

In this case, the trial concluded that the contact in this case was not a "social contact." CP 25. The trial court held that the social contact

ended when the deputy asked the occupants what their names might be. CP 25. The trial court concludes that this was part of an “investigation.” Certainly the deputy was curious why two persons were sitting in a car at 3:30 AM watching movies. To inquire is technically an investigation in the common sense of the word, but not in the search/seizure sense of the word. If this situation was turned into an “investigation” by the asking of names, then there can be no social contact whenever an officer asks for a name. All contacts between officers and citizens would be an “investigation” and seizure.

The reasoning of the trial court obviates the holdings in *State v. O'Neill*, 148 Wn.2d 564, 579, 62 P.3d 489 (2003) and *State v. Young*, 135 Wn. 2d 498, 957 P.2d 681 (1998) regarding social contacts by officers. The cases on seizure, passengers and pedestrians do stand for the proposition that asking of names can convert a contact into a seizure, but the trial court’s holding regarding the conversion of a social contact into an investigation is mistaken. The trial court in this case failed to appreciate that there is no distinction between a “passenger” and a “pedestrian” when an officer approaches a vehicle that is legally parked in a public place. *O'Neill, supra* at 579.

Given that there is no functional difference between a pedestrian and a passenger in a parked automobile, the holding in *Armenta* is

instructive: “[W]e endorse the view expressed by the Court of Appeals in *Aranguren* to the effect that “police questioning relating to one’s identity, or a request for identification by the police, without more, is unlikely to result in a Fourth Amendment seizure.” *citing* *State v. Aranguren*, 42 Wn. App. 452, 455, 711 P.2d 1096 (1985); *State v. Armenta*, 134 Wn.2d 1, 11, 948 P.2d 1280 (1997).

What the trial court did in this case was to engage in some faulty conflation of seizure law involving investigations and overlay a faulty analysis of social police contacts on top of seizure law. The trial court concluded that the defendant was a “passenger in a vehicle” and not a pedestrian. CP 25. This conclusion is untenable in light of the Washington State Supreme Court holdings in *O’Neill*. As stated previously, there is *no* distinction between a “passenger” and a pedestrian when the situation involves a legally parked, non-moving vehicle. *O’Neill, supra* at 579. *See also* *State v. Thorn*, 129 Wn.2d 347, 917 P.2d 108 (1996), *overruled in part* by *State v. O’Neill*, 148 Wn.2d 564, 571, 62 P.3d 489 (2003). The holdings removing the distinction between the occupant of a parked car and a pedestrian are logical. The occupant of a parked vehicle could be seated on a park bench next to the car when police approach. Few would argue that a person sitting on a bench next to the car is a “passenger.” Yet, the options available to either

the occupant of a parked car or the person on a nearby bench are the same. They can refuse to answer the officer's questions and move away.

The trial court continued its faulty analysis of this case by holding that "This was not a "social contact" when the deputy asked for identification for *no apparent reason....*" CP 25. This holding makes no sense. None of the cases in this area of the law require the officer to have a reason for contacting the occupants of the car. If officers have to have a reason prior to contacting individuals, the social contact scenario will disappear. Reasonless contacts are at the heart of social contacts by police. The trial court erred by even considering the motivation of the deputy. The deputy's motivation is irrelevant. The court in *Young* held that, "...the police are permitted to engage persons in conversation and *ask for identification* even in the absence of an articulable suspicion of wrongdoing." *State v. Young*, 135 Wn.2d at 511.

The reasons for asking the names are fairly obvious, it is law enforcement's job to keep up on events in the city and they need to fill out reports when necessary. There is no principal preventing police officers from making a social contact with a pedestrian in a public place.

The trial court in this case held that *State v. Brown*, 154 Wn.2d 787, 117 P.3d 336 (2005) applies to this case. *Brown* is clearly distinguishable from the facts of this case. This is an indefensible decision

in that *Brown* involves the stop of a vehicle as opposed to an officer approaching a parked auto. The car in which Brown was riding was stopped at 10:48 P.M. The officer in *Brown* did not take the defendant's answers at face value, but instead asked to search of the defendant. *Brown, supra* at 791-92.

Brown simply does not apply to this case. The car in this case was not stopped by police. The defendant was in a legally parked, non-moving vehicle. The trial court in this case held that the deputy was asking the occupants' names for the purposes of an investigation. CP 25. This position is not supported by the facts. The deputy could not have been investigating a traffic violation; the car was not moving when sighted. There could be no suspicion of drug activity as there was nothing in the record indicating that the occupants were engaged in the use of drugs. In short, the deputy had no reason to be starting an "investigation" in the constitutional law sense of the word. The deputy merely approached the car to see why there were two occupants parked at the unusual morning hour. The defendant said they were watching movies and the presence of a portable movie player bore out that assertion. The deputy, apparently satisfied that there were no issues, asked the occupants their names, received that information and returned to his patrol car. At this point, the defendant was free to depart. In fact, he did start to drive away.

In *Mote*, the police officer pulled behind an occupied, legally parked car on a residential street. *State v. Mote*, 129 Wn. App. 276, 279, 120 P.3d 596 (2005). The officer walked up to the driver's side window and asked for identification from both occupants. *Id.* The officer ran a warrant check on the front passenger and found an active warrant. *Id.* The defendant was arrested and a baggie of methamphetamine was discovered on his person. *Id.* The defendant in *Mote* argued that *State v. Rankin*, 151 Wn.2d 689, 92 P.3d 202 (2004) applied to his case and the questions by the police officer rose to the level of a seizure. The *Mote* court rejected the *Rankin* holding for the same reasons that the State puts forward in this case: *Rankin* (as well as *Brown*) involve *stopping* cars rather than approaching a parked car. *Mote, supra.* The relevant facts in *Mote* are nearly identical to those in this case.

Interestingly, the trial court must have thought that *Mote* was important or the trial court would not have taken the trouble to note in its Conclusions of Law that the court writing *Mote* was Division One of the Court of Appeals and therefore not binding on the trial court. CP 26. This is a rather peculiar statement in that the *Mote* case is directly on point and there is no case from this Division so close to the facts of this case. To simply refuse to distinguish or follow *Mote* because it is from Division

One is not defensible. The case is at least instructive, no matter which court wrote it.

The trial court's analysis of this case is not in harmony with existing caselaw of both the Court of Appeals and the Washington State Supreme Court. The trial court's holdings are questionable and in some places, flat out wrong. This Court should reverse the trial court's holding suppressing the State's evidence.

V.

CONCLUSION

For the reasons stated, the decision of the trial court suppressing the State's evidence should be reversed.

Dated this  day of February, 2008.

STEVEN J. TUCKER
Prosecuting Attorney



Andrew J. Metts #19578
Deputy Prosecuting Attorney
Attorney for Respondent